NOT ARGUMENT

No. 89-453

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF COOK INLET REGION, INC. AND GRANITE BROADCASTING CORPORATION *AS AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) ..... *passim*

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Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978) 8

Report of the National Advisory Commission on Civil Disorders (1968) 13-14

U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1989* (1989) 9

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF COOK INLET REGION, INC. AND GRANITE BROADCASTING CORPORATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*•

This case involves the constitutionality of one aspect of the Federal Communications Commission's minority ownership

• The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 37.3.

policies.[1] *Amici curiae*, Cook Inlet Region, Inc. ("CIRI") and Granite Broadcasting Corporation are minority-controlled broadcasters. Through the use of the FCC's tax certificate program, one of the mainstays of its minority ownership policies, CIRI and Granite have been able to enter the broadcast field as owners and controlling parties of a number of broadcast stations.

Amici submit this brief to bring to the attention of this Court the common constitutional underpinnings of the Commission's minority ownership policies and numerous other Commission policies, as well as the tax certificate policy, the only facet of the minority ownership policies not pending before this Court. Pursuant to the Court's new Rule 37(a), *amici* believe that these are relevant matters that have not already been raised with this Court.

1. Cook Inlet Region, Inc., and Cook Inlet Communications, Inc.

CIRI is one of the 13 regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act in 1971. CIRI is owned by approximately 6,500

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[1] The Commission's minority ownership policies are: the comparative enhancement credit at issue in this case, the tax certificate, and the distress sale, which is pending before this Court in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, *cert. granted*, No. 89-700 (Jan. 8, 1990). *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) [hereinafter cited as *1978 Policy Statement*].

Athabaskan, Eskimo, Aleut, and other Alaska Native shareholders, who live in 48 states.[2] CIRI is therefore a "minority-owned" or "minority-controlled" entity pursuant to policy statements of the Commission issued under the Communications Act of 1934, as amended. *See 1978 Policy Statement*, 68 F.C.C.2d at 983 & n.20; *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, Policy Statement and Notice of Proposed Rule Making*, 92 F.C.C.2d 849 (1982)[3] [hereinafter cited as *Advancement of Minority Ownership*]; *see also* 47 C.F.R. § 73.3555(d)(3)(iii) (1988) (defining "minority-controlled").

CIRI operates two television stations and eleven radio stations[4] through limited partnerships in which its wholly-owned subsidiary, Cook Inlet Communications, Inc. ("CICI"),[5] is the controlling general partner with exclusive powers of management. The CICI board, composed of five Alaska Native CIRI shareholders, is centrally involved in the selection of

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[2] The Alaska Native population suffers from significantly greater unemployment, educational handicaps, and serious disease and injury than the general American population. Accordingly, as a matter of corporate policy, CIRI distributes approximately one-third of its net income directly to its shareholders for income maintenance. In addition, CIRI provides college scholarships and vocational training to Alaska Natives, and sponsors programs designed to enhance understanding of Alaska Native culture and history and to develop Native arts.

[3] See infra n.11 and accompanying text.

[4] CICI is the managing general partner of WTNH-TV, the ABC affiliate in New Haven, Connecticut, and WSMV-TV, the NBC affiliate in Nashville, Tennessee. CICI is also the managing general partner of eleven radio stations, including FM stations in Atlanta, Boston, Chicago, Houston, and Seattle, and AM/FM combinations in Scottsdale, Arizona; Provo, Utah; and Morningside, Maryland.

[5] CICI is 100% owned by Cook Inlet Corporation, which is 100% owned by CIRI.

management personnel and the review of the budget, programming, news, and all capital expenditures.

CICI has implemented a diversity-in-programming plan that specifically directs its station managers to develop programming sensitive to the viewpoints and contributions to society of minorities in general and Native Americans in particular. CICI also follows the philosophy of CIRI in encouraging the employment of Alaska Natives and other minorities in its stations.

2. Granite Broadcasting Corporation

Granite is a privately-owned Delaware corporation organized in 1988 by W. Don Cornwell and Stuart J. Beck for the purpose of acquiring and managing television stations. Mr. Cornwell, who is black, has been the Chairman of the Board and President of Granite since its incorporation, and holds 55% of Granite's voting stock.[4] Granite is therefore a "minority-owned" entity under the Commission's rules and policies.

Granite owns and operates two NBC-affiliated television stations, WEEK-TV, Peoria-Bloomington, Illinois, and KBJR-TV, Duluth, Minnesota - Superior, Wisconsin, and one ABC-affiliated television station, WPTA-TV, Fort Wayne, Indiana. Granite also recently acquired KNTV, an ABC affiliate serving San Jose and Santa Clara County, California.

Granite encourages the employment and advancement of minorities in its television stations, and seeks to broaden the diversity of programming offered to the communities it serves. Granite's programming philosophy, outlined in a Mission Statement issued to its stations, is premised on its recognition

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[4] Mr. Beck, the Secretary-Treasurer and a Director of Granite, holds the other 45% of Granite's voting stock.

that the local community represents a multitude of interests and viewpoints which should be reflected in and enhanced by each station's programming.

3. The FCC's Tax Certificate Policy Enabled CIRI and Granite to Become Broadcasters

Small, minority-owned companies, CIRI and Granite were able to acquire broadcast properties largely as a result of the FCC's tax certificate policy.[3] The Commission adopted its tax certificate policy in 1978 as part of its effort to increase minority ownership of broadcast facilities. *See 1978 Policy Statement*, 68 F.C.C.2d at 982-83.[5] In its *1978 Policy Statement*, the Commission noted that although it had earlier adopted other rules and policies[6] to combat discrimination and ensure that programming reflects the needs, interests, and problems of a licensee's community, the "views of racial minorities continue to be inadequately represented in the broadcast media." *Id.* at 980-81. The Commission concluded:

> [i]t is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of

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[3] The constitutionality of the tax certificate policy is not before this Court. Nonetheless, the tax certificate represents an important interest that could be affected by the Court's examination of two other facets of the Commission's minority ownership policies, the minority enhancement in this case and the distress sale in *Astroline*. Of course, whatever the resolution of the two pending cases questioning these other aspects of the minority ownership policies, a full and particularized consideration of the minority tax certificate policy is necessary before any change in that policy can be effected.

[5] The *1978 Policy Statement* also announced the Commission's minority distress sale policy. 68 F.C.C.2d at 982-83.

[6] *See infra* at 19-21.

> broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of a limited resource, the spectrum. And, of course, . . . "diversification . . . is a public good in a free society . . . ."

Id. at 981, *quoting Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [hereinafter cited as *Comparative Broadcast Hearings*]. Thus, the Commission at that time thought that diversity of ownership would lead to diversification of programming and viewpoints. The Commission also noted that, in accordance with controlling case law, it had already begun to give consideration to minority ownership and participation as a comparative enhancement in the award of licenses in comparative broadcast hearings. *Id.* at 981-82; *see TV 9, Inc. v. FCC*, 495 F.2d 929, 936-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *see also West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 606-16 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975). Nonetheless, "the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action." *1978 Policy Statement*, 68 F.C.C.2d at 982.

The Commission therefore expanded the use of its tax certificate and distress sale programs in order to increase minority ownership, and thus diversification of ownership and programming, key objectives of the Communications Act of 1934. *1978 Policy Statement*, 68 F.C.C.2d at 981. Pursuant to

26 U.S.C. § 1071,[9] the Commission announced that it would issue tax certificates to owners who voluntarily sold their broadcast stations to minority-controlled entities.[10] *Id.*

While the tax certificate policy enabled both CIRI and Granite to become broadcasters, it did not guarantee their purchase of any broadcast property. In fact, CIRI and Granite have unsuccessfully bid for various broadcast properties which were then sold to non-minorities, without tax certificates. The tax certificate thus eases the minority-controlled entity's entry

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[9] Section 1071 authorizes the Commission to issue tax certificates whenever a sale of a broadcast property is certified by the Commission as "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations." 26 U.S.C. § 1071. The tax certificate enables sellers of broadcast properties to defer capital gains taxation on such sales. *Id.*

Section 1071 was enacted in 1943 in response to the Commission's adoption of its multiple ownership rules, which prohibit the common control of competing stations in the same market. *See Issuance of Tax Certificates*, 19 Rad. Reg. 1831, 1832 (1970); *see also* Blake and McKenna, *Section 1071: Deferral of Tax on FCC Sanctioned Dispositions of Communications Properties*, 36 TAX L. REV. 101, 108-09 (1980). Although originally used only when the Commission's multiple ownership rules required divestiture of broadcast properties (*i.e.*, through involuntary transfers), Section 1071 has long since been used to encourage licensees to transfer "grandfathered" broadcast properties. *Advancement of Minority Ownership*, 92 F.C.C.2d at 856-57 & nn.35-38.

[10] Eligible buyers would be minority-controlled entities or entities in which "minority involvement is significant enough to justify the certificate in light of the purpose of the [minority ownership] policy . . . ." *1978 Policy Statement*, 68 F.C.C.2d at 983 n.20. In 1982, the tax certificate and distress sale policies were extended to "limited partnerships where the general partner, or partners, owns [sic] more than 20 percent of the broadcasting entity and is a member, or members, of a minority group." *See Advancement of Minority Ownership*, 92 F.C.C.2d at 855; *see also Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Memorandum Opinion and Order*, 58 Rad. Reg. 2d 604 (1985) (limited partnerships).

into the industry, but other obstacles, common to minorities and non-minorities alike, remain.

4. The FCC's Minority Ownership Policies Have Had A Beneficial Effect In Increasing Minority Ownership

The Commission's minority ownership policies have made real, but incremental, improvements in minority ownership of broadcast properties. The tax certificate policy has been the most effective of the three minority ownership programs; from 1978 to November 22, 1989, the Commission issued 201 tax certificates in conjunction with the assignment or transfer of radio and television stations. *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 74 (1989) (statement of Roderick K. Porter, Deputy Chief, Mass Media Bureau, FCC). Notwithstanding these advances, minority ownership of broadcast stations continues to be minimal -- since 1978, the percentage of minority-owned broadcast stations has increased from less than one percent, to just over two percent, while minorities represent over 20% of the population. *Id.* at 2 (opening statement by Sen. Inouye); U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1989* 13, 16, 38 (1989). The "acute underrepresentation of minorities" among broadcasters thus continues even in the face of policies designed specifically to combat it. *See 1978 Policy Statement*, 68 F.C.C.2d at 981; *see also* Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978), *cited in 1978 Policy Statement*, 68 F.C.C.2d at 980 n.9.

As minority-controlled broadcasters whose participation in the industry was made possible by one of the FCC's minority

ownership policies[12] -- the tax certificate program -- CIRI and Granite file this brief in support of the comparative enhancement accorded to minority-controlled applicants in Commission licensing proceedings and affirmed by the court below. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *reh'g denied*, Nos. 85-1755, 85-1756 (D.C. Cir. June 21, 1989), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, No. 89-453 (Jan. 8, 1990). Like the tax certificate program, the minority enhancement is narrowly tailored to promote important governmental policies and is only one of several factors influencing whether a minority group member will become a Commission licensee.

SUMMARY OF ARGUMENT

The Commission's minority ownership policies clearly conform with constitutional requirements for racial classifications. The policies under review are "narrowly tailored" to achieve a "compelling government interest" and, therefore, pass constitutional muster under the "strict scrutiny" standard.

The compelling governmental interest served by the Commission's minority ownership policies is to advance diversity of ownership as a means of achieving diversity of programming service to the public. This longstanding governmental interest has been affirmed by this Court in *Federal Communications Comm'n v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796, 801 (1978) [hereinafter cited as *NCCB*], which recognized the First Amendment value of diversity of programming and endorsed the nexus between diversity of ownership and programming. Indeed, a significant number of Commission policies and rules, including the multiple ownership rules, are premised upon the fundamental belief that diversity

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[12] CIRI and Granite also had to be, and were found, qualified to become Commission licensees. See infra at 21-22.

of ownership is more likely to lead to diversity of programming viewpoints. The minority ownership policies at issue here are but one example of the Commission's efforts to achieve diversification of ownership and programming.

The minority ownership policies, and in particular the minority enhancement policy, are clearly narrowly tailored to achieve the Commission's and Congress' goals of enhancing programming diversity through diversification of broadcast ownership. Although the Commission previously promulgated race-neutral policies to prevent discrimination and to increase minority participation in broadcasting, none of these policies had any appreciable impact. Thus, the Commission determined that it was necessary to promote minority ownership in order to nurture minority voices and viewpoints in broadcasting.

The minority enhancement policy does not involve any quota or set aside such as this Court has found constitutionally offensive in other cases. Like the minority tax certificate policy, an applicant seeking minority enhancement in a comparative hearing must satisfy all of the Commission's licensing requirements before the benefit associated with being a minority-controlled entity may be realized. Moreover, the burden of the minority enhancement policy on non-minorities is de minimis. A non-minority is not foreclosed from broadcast ownership by virtue of the minority enhancement policy. The minority enhancement merely serves as a "plus factor" to be considered with all other factors in a comparative hearing; it does not automatically entitle a minority to become a licensee. Accordingly, the Commission's minority ownership policies are appropriately narrowly tailored to achieve the Commission's interest in diversifying ownership in order to enhance programming viewpoints.

ARGUMENT

I. THE MINORITY OWNERSHIP POLICIES ARE CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS

The Commission's minority ownership policies clearly satisfy the constitutional requirements for racial classifications. To pass constitutional muster under the "strict scrutiny" standard of equal protection analysis,[14] a racial classification must meet a two-pronged test: 1) it must be justified by a compelling governmental interest; and 2) the means chosen to effectuate that interest must be "narrowly tailored to the achievement of its goal." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (opinion of Burger, C.J.); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274, 280 (1986) (opinion of Powell, J.).

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[14] It is arguable whether racial classifications made by the federal government and federal agencies should be subject to strict scrutiny. Although this Court has applied strict scrutiny where the racial classification was made by a state or local government, *see City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989), it has not directly addressed the standard applicable to the federal government. *Amici* believe that the federal government's racial classifications deserve more deference than the strict scrutiny standard. Whatever the correct standard, however, the Commission's minority ownership policies clearly withstand strict scrutiny analysis.

A. The FCC's Minority Ownership Policies Are Justified By A Compelling Governmental Interest In Diversity Of Broadcast Ownership And Programming

The Commission's minority ownership policies, which Congress has by statute insisted be maintained,[14] serve the

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[14] There can be no doubt that the policies at issue here are those of Congresss, as evidenced by: 1) Congress' enactment of appropriations provisions for 1988, 1989, and 1990 expressly barring the FCC from reexamining, changing, or repealing the minority ownership policies, *see* Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 to 1329-32 (1987); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989); and 2) Congress' 1982 amendment of the Communications Act of 1934 to authorize the Commission to grant licenses using a random selection system with significant preferences for minority-controlled applicants "[t]o further diversify" broadcast ownership, *see* Communications Amendments Act of 1982 – National Telecommunications and Information Administration, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (1982); 47 U.S.C. § 309(i)(3); *see also Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce on H.R. 5373*, 99th Cong., 2d Sess. 13 (1986) (statement of Chairman Wirth) (Congress "explicitly established" and "repeatedly endorsed" minority ownership policies). *See West Michigan*, 735 F.2d at 612-13, 615; *but see Winter Park*, 873 F.2d at 362-67 (Williams, J., dissenting)

It is clear that Congress has power to act in this area pursuant to the Due Process Clause of the Fifth Amendment and the Commerce Clause. *See Fullilove*, 448 U.S. at 475; *Federal Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364, 376 (1984).

Amici believe that Congress' legislative enactments and reports clearly give the Commission's minority ownership policies Congressional stature, and that the policies should therefore be evaluated by this Court as Congressional enactments. Nonetheless, even if the policies are not Congressional enactments or Congressionally mandated, they were adopted

compelling governmental interest in advancing diversity in ownership as a means of enhancing diversity in programming service to the public.[15] *See Amendment of Sections 73.34,*

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pursuant to delegated authority and have the force of federal law. *See Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 379-80 (1969). Further, they are consistent with constitutional requirements.

[15] This Court has previously recognized two interests as sufficiently "compelling" to justify race-conscious governmental policies and programs: 1) the remedying of racial discrimination, *see Croson*, 109 S. Ct. at 721-23 (plurality opinion of O'Connor, J.); *Fullilove*, 448 U.S. at 477-78; and 2) a public university's interest in a racially diverse student body, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). This Court has never held, however, that these are the only two interests substantial enough to pass constitutional muster in the face of an equal protection challenge. *See Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies"). Even so, the governmental interest in programming and viewpoint diversity in this case closely parallels the governmental interest in *Bakke* in a diverse student body. *See Bakke*, 438 U.S. at 311-15. Exposure to a wide variety of viewpoints is as important for this nation's electorate as it is for a university's student body. *Id.* at 312, *citing Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues' . . .").

Further, although it is beyond the scope of this brief, *amici* believe that the Congressional enactments regarding the Commission's minority ownership policies make it clear that a second constitutional basis for these policies is to remedy racial discrimination. *See* note 14, *supra*. Congress asserted a remedial purpose for its enactments in this area, and there is also an "abundant historical basis" to support the policies. *See Fullilove*, 448 U.S. at 477-78; *see also Croson*, 109 S. Ct. at 719. Further, in promulgating its equal employment rules, the Commission suggested that such efforts might be remedial in part when it quoted the 1968 *Report of the National Advisory Commission on Civil Disorders*:

73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1079 (1975) [hereinafter cited as *1975 Multiple Ownership Report*]. This Court has repeatedly recognized the First Amendment value of, and compelling governmental interest in, diversity of programming. *See, e.g., NCCB*, 436 U.S. at 796, 801 (affirming against First Amendment challenge Commission's newspaper/broadcast cross-ownership rule as means to "enhance the diversity of information heard by the public"); *Red Lion*, 395 U.S. at 390 ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here"); *see also Federal Communications Comm'n v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (Commission's position on review of format changes "reflects a reasonable accommodation of the policy of promoting diversity in programming"); *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 217 (1943) ("avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States").

Commission policies promoting diversification of programming rest on the belief, basic to our society, that "the

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> It would be a contribution of inestimable importance to race relations in the United State simply to treat ordinary news about Negroes as news of other groups is now treated . . . . Television should develop programing which integrates Negroes into all aspects of televised presentations . . . . While some of these steps are being taken, *they are still largely neglected*.

Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.2d 766, 775 (1968) (emphasis added); *see also id.* at 775 ("We stress that we are not condemning the broadcast media for past actions or neglect. It is fruitless to focus on the past.").

widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order*, 22 F.C.C.2d 306, 310 (1970) [hereinafter cited as *1970 Multiple Ownership Report*]. A central issue, therefore, is whether the Commission's minority ownership policies further the long-recognized governmental interest in diversity of programming, without running afoul of the First Amendment.

Almost since its inception, the Commission has promulgated policies and rules based on this premise that ownership and programming diversity are inextricably linked[19] – *i.e.*, that diversification of ownership will ultimately broaden the diversity of programming available to the broadcast

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[19] The significance of ownership from this First Amendment viewpoint "lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *1975 Multiple Ownership Report*, 50 F.C.C.2d at 1050; *see 1970 Multiple Ownership Report*, 22 F.C.C.2d at 311; *see also Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order*, 45 F.C.C. 1476, 1477, 1482 (1964) ("the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a . . . programming sense, on public opinion at the regional level"); *Editorializing By Broadcast Licensees*, 13 F.C.C. 1246, 1252 (1949) (authority to program enables licensee "to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts"). As the U.S. Court of Appeals for the District of Columbia Circuit stated in holding that minority status is a relevant factor in the comparative licensing analysis, "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news." *TV 9*, 495 F.2d at 938.

audience.[17] For example, in 1953, the Commission promulgated the first of its multiple ownership rules, whose "fundamental purpose" is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints".[18] *Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, *Report and Order*, 18 F.C.C. 288, 291-92 (1953). The Commission's 1965 *Policy Statement on Comparative Broadcast Hearings* made diversification of ownership one of the two major factors to be considered in comparative licensing proceedings.[19] 1 F.C.C.2d at 394-95. The minority ownership policies are thus one part of a

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[17] In addition, the First Amendment precludes more direct means of achieving diversity of programming. *See NCCB*, 436 U.S. at 800-02; *1978 Policy Statement*, 68 F.C.C.2d at 981.

[18] The multiple ownership rules initially limited the common control of broadcast stations. The Commission's current rules include limitations on broadcast/newspaper cross-ownership, cable/telephone company cross-ownership, broadcast service cross-ownership and common control of broadcast stations. *See* 47 C.F.R. §§ 73.3555, 76.501 (1988).

The current multiple ownership rules also include a "minority incentive" in order to foster minority ownership. *See* 47 C.F.R. § 73.3555(d)(3)(iii); *Amendment of § 73.3555 [formerly §§ 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, *Memorandum Opinion and Order*, 57 Rad. Reg. 2d 966, 981-82 (1985) (multiple ownership rules play role in increasing minority ownership).

[19] The Commission has focused on diversification of control of the media of mass communications in fulfilling its responsibility to determine that the grant of a license serves "the public interest, convenience, and necessity." 47 U.S.C. § 309(a); *see 1975 Multiple Ownership Report*, 50 F.C.C.2d at 1048-49.

comprehensive regulatory framework resting on the nexus between diversity of ownership and programming.[20]

This Court has itself recognized the strong link between diversity of ownership and diversity of programming. In affirming the Commission's newspaper/broadcast cross-ownership rule, the Court in *NCCB* stated that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." 436 U.S. at 796. The U.S. Court of Appeals for the District of Columbia Circuit has also repeatedly validated the Commission's promotion of ownership diversity as a means of enhancing viewpoint diversity in a variety of contexts,[21] *see, e.g.*, *West Michigan*, 735 F.2d at 610-11; *Garrett*,

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[20] In arguing that programming diversity is not a compelling governmental interest, and further, that even if it is, it has been achieved, Petitioner would undo much of the Commission's regulatory structure.

In addition, Petitioner's contention, based on the Commission's brief in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), that the FCC itself has admitted that diversity of programming has been achieved, is only partially correct. While one Commission case may have suggested that the Commission has reached that determination, the recent, only partial relaxation of the one-to-a-market and duopoly rules counsels otherwise. *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, *Second Report and Order*, 4 FCC Rcd. 1741, 1751 (1989); *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, *First Report and Order*, 4 FCC Rcd. 1723 (1989).

Finally, while there may arguably be sufficient diversity in some markets, there may still be insufficient representation of minority viewpoints even amongst such diversity.

[21] Petitioner contends that application of the minority ownership policies to achieve programming diversity results in "stigmatic harm", because such application says that race determines what people want to hear and broadcasters to show, and it perpetuates stereotypes of minorities. Pet. Brf. at 37-38, 40-41. As an initial matter, Petitioner's argument assumes the premise that Petitioner is challenging in this case -- that ownership will indeed

513 F.2d at 1062-63; *TV 9*, 495 F.2d at 937-38; *see also Gottfried v. FCC*, 655 F.2d 297, 308-09 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982) (Rehabilitation Act and FCC), as has Congress. *See* H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 40, *reprinted-in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2237, 2284 (nexus "repeatedly recognized by both the Commission and the courts").

The connection between the Commission's minority enhancement policy and the important government policy favoring diversity of viewpoints and programming is thus precisely the nexus on which the Commission has built the regulatory structure governing the award of broadcast licenses and the ownership of broadcast media.

B. The FCC's Minority Ownership Policies, And Its Minority Enhancement Policy In Particular, Are Narrowly Tailored To Achieve The Goals Of Diversity Of Broadcast Ownership And Programming

A variety of factors are relevant to whether a race-conscious policy is "narrowly tailored" to achieve its goal, including "the necessity for the relief and the efficacy of

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effect programming. Secondly, Petitioner's argument is based on the clearly erroneous assumption that minority owners will somehow encourage or perpetuate racial stereotyping in their programming. One of the main reasons to broaden the diversity of owners, however, is to fight such stereotyping. Finally, owners with different backgrounds and heritages may well present programming with varying perspectives, and just as non-minority owners from different backgrounds enhance diversity, so having a full variety of minority owners – doubtless also from different backgrounds – will enhance overall programming diversity. Since minorities have been and remain acutely underrepresented in broadcasting, however, affirmative actions by the Commission, and not merely an acknowledgement that broadcast ownership is now available to everyone, are required to ensure that the full spectrum of minority viewpoints is represented in the broadcasting industry.

alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987) (opinion of Brennan, J.); *id.* at 187 (Powell, J., concurring). The Commission's minority enhancement policy is clearly narrowly tailored to further the important governmental interest in diversity of programming.

The Commission adopted its minority ownership policies[17] only after it had instituted race-neutral policies designed to prevent discrimination and increase the minority voice in broadcasting, and those policies had not succeeded. *See 1978 Policy Statement*, 68 F.C.C.2d at 980; *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), Memorandum Opinion and Order*, 82 F.C.C.2d 329, 335-37 (1980) [hereinafter cited as *Top 50*

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[17] The minority enhancement policy has its roots in the decision of the U.S. Court of Appeals for the District of Columbia Circuit in 1973 in *TV 9*, which held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." 495 F.2d at 936-38. *See also West Michigan*, 735 F.2d at 613-16 (denying equal protection challenge to minority enhancement policy).

In 1978, the Commission formally adopted the policy of considering minority ownership and participation as enhancement factors under the "best practicable service" criteria in the comparative licensing proceeding. *WPIX, Inc.*, 68 F.C.C.2d 381, 411, 412 n.31 (1978). Prior to the Commission's statements in *WPIX*, Administrative Law Judges and the Review Board followed the *TV 9* pronouncement, treating minority ownership and participation as a "plus factor" to varying degrees and in a variety of forms. *See, e.g., Gainesville Media, Inc.*, 72 F.C.C.2d 807, 814-16 (Rev. Bd. 1978); *Flint Family Radio, Inc.*, 69 F.C.C.2d 38, 46-48 (Rev. Bd. 1977); *Mid-Florida Television Corporation*, 69 F.C.C.2d 549, 598-602 (ALJ 1977).

Policy].[25] Among those unsuccessful policies were the emphasis on diversification of control in comparative licensing (without consideration of minority status), the ascertainment policy[26], and the equal employment rules.[27] *See 1978 Policy Statement*, 68 F.C.C.2d at 980-81; *Comparative Broadcast Hearings*, 1 F.C.C.2d at 394-95; *see also* 47 C.F.R. § 73.2080 (1988) (EEO rules). In its *1978 Policy Statement*, the Commission concluded that its

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[25] In the *Top 50 Policy*, the Commission discussed its "numerous steps to further EEO [Equal Employment Opportunities] in the broadcasting industry", including the top 50 policy, the nondiscrimination and affirmative action rules, the Form 395 Annual Employment Report, the Model EEO program, ascertainment obligations, distress sales, tax certificates, and expedited processing of broadcast applications to minority-owned entities. 82 F.C.C.2d at 334-36. The U.S. Court of Appeals for the District of Columbia Circuit noted in *NAACP v. FCC* that the Top 50 policy "was not intended directly to promote these minority interests but only to ensure a diversity of program sources." 682 F.2d 993, 1003 (D.C. Cir. 1982).

[26] The ascertainment policy required broadcasters to interview members of the community on an ongoing basis to "ascertain" what issues they felt were important to the community. It was presumed that broadcasters would use that information in programming decisions. *See Ascertainment of Community Problems by Broadcast Applicants*, 53 F.C.C.2d 3 (1975).

[27] *See also Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, Second Report and Order*, 50 F.C.C.2d 829, 852 (1975) (stations should program "material particularly directed to the needs or problems of the station's community and area . . . , *including programming addressed to the special needs of minority groups*") (emphasis added).

Although Petitioner contends that no race-neutral attempts to increase programming diversity were made, it then contradicts itself, citing the Commission's former specialized programming policy, under which an applicant could show that its proposed programming addressed the special needs of minorities in the area, as one race-neutral means of serving the programming needs of minorities. Pet. Brf. at 43 & n.107. *See, e.g., J.R. Earnest and John A. Flache, D.B.A. La Fiesta Broadcasting Co.*, 6 F.C.C.2d 65 (1966); *Herbert Muschel*, 33 F.C.C. 37 (1962); *Fort Terminal Broadcasting Co.*, 6 F.C.C. 271 (1938).

ascertainment and equal employment rules were not enough, and that "ownership of broadcast facilities by minorities is *another* significant way of fostering the inclusion of minority views in the area of programming."[28] 68 F.C.C.2d at 981 (emphasis added).

The minority enhancement policy, like the tax certificate policy, provides adequate flexibility in application to pass constitutional muster. *See Winter Park*, 873 F.2d at 352-55. A minority entity wishing to receive enhancement credit during the comparative licensing proceeding must first satisfy all of the FCC's many licensing qualifications, as well as a determination that it is indeed minority-controlled. Thus, the Commission must examine the proposed licensee on a case-by-case basis to determine if grant of the license is in the "public interest."[29] Should the minority entity not meet any one of these requirements, it will be excluded from further consideration for the license. Moreover, even if the minority applicant passes muster on all basic qualifying tests, to succeed in obtaining the license, it must be judged superior to other applicants on a

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[28] The Commission in its *1978 Policy Statement* adopted the minority tax certificate and distress sale policies to help in the effort to combat the fact that "...the views of racial minorities continue to be inadequately represented in the broadcast media." 68 F.C.C.2d at 980. The Commission's recognition of the small number of minority-owned broadcast stations made necessary the institution of national policies designed to increase significantly minority ownership. *See Paradise*, 480 U.S. at 171; *cf. West Michigan*, 735 F.2d at 610-12 (goal of increasing diversity of content through diversity of ownership is national policy, operating "without regard to the size or existence of a minority population in the community of license", which is designed to ameliorate the underrepresentation of minorities within "the nation's broadcast media").

[29] The Commission's minority enhancement policy is therefore unlike the set aside in *Bakke*, where denial to Bakke "of this right to individualized consideration without regard to his race [was] the principal evil of [the University's] special admissions program." 438 U.S. at 318 n.52.

variety of race-neutral factors, including local residence, civic participation, and media ownership.[28]

In addition, as the court below found, unlike the race-conscious policies found unconstitutional in *Bakke* and *Croson*, the Commission's minority ownership policies do not involve numerical goals, quotas, or set asides. *Winter Park*, 873 F.2d at 354; *see Croson*, 109 S. Ct. at 728 ("rigid numerical quota"); *Bakke*, 438 U.S. at 316 ("fixed number of places"). The comparative enhancement for minority ownership and integration is only one factor to be considered in a comparative licensing proceeding.[29] *Winter Park*, 873 F.2d at 353; *cf. Bakke*, 438 U.S. at 317-18.

The burden of the FCC's minority enhancement policy on non-minorities is minimal. Like the minority hiring goals that this Court endorsed in *Fullilove* and *Steelworkers v. Weber*, 443 U.S. 193 (1979), the minority enhancement policy "impose[s] a

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[28] *See Comparative Broadcast Hearings*, 1 F.C.C.2d at 394 (diversification factor of primary significance); *see also Radio Jonesboro, Inc.* 57 Rad. Reg. 2d 1564, 1567-69 (1985) (minority ownership and local residence equally significant enhancement factors; applicant with 100% integration of local residents with broadcast experience and civic participation prevails over opponent with 100% minority integration enhanced by civic participation); *Horne Industries, Inc.*, 98 F.C.C.2d 601, 604 n.12 (1984) ("qualitative attributes [local residence, minority ownership, civic participation] . . . may enhance the value of an integration proposal but cannot overcome clear quantitative differences [diversification and integration]"); *Las Misiones de Bejar Television Co.*, 53 Rad. Reg. 2d 119, 121-22 (Rev. Bd. 1983) (100% minority-owned applicant proposing 12.5% integration comparatively inferior to 90% integrated, non-minority applicant).

[29] Similarly, while any transfer of a license offers a potential opportunity for application of the tax certificate policy, many other factors enter into the sale of a broadcast property that may make the tax certificate unattractive, or not attractive enough to surmount other considerations, to the seller. That the tax certificate policy does not involve any "set aside" certainly makes it even more narrowly tailored and less constitutionally troublesome than the minority program approved in *Fullilove*.

diffuse burden [on third parties], often foreclosing only one of several opportunities." *Wygant*, 476 U.S. at 283. Such a burden is constitutionally permissible: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove*, 448 U.S. at 484, *quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976); *see Wygant*, 476 U.S. at 281-83.

The minority enhancement policy is akin to the "plus factor" spoken of approvingly in *Bakke*, and is merely one of several factors to be considered during the comparative licensing proceeding. *See* 438 U.S. at 317-18. It does not foreclose non-minorities from filing applications and competing and being considered for a broadcast license in a comparative proceeding. *See Bakke*, 438 U.S. at 318. It does not enable an unqualified minority or a sham "minority" entity to obtain a broadcast license. *See, e.g., Metroplex Communications, Inc.*, 4 FCC Rcd. 8149 (Rev. Bd. 1989). It does not override all other comparative factors. *See WPIX, Inc.*, 68 F.C.C.2d at 411; *see also Comparative Broadcast Hearings*, 1 F.C.C.2d at 394-97. Rather, the minority enhancement policy will only tip the balance for the minority applicant over an otherwise equally qualified non-minority.[29] *Winter Park*, 873 F.2d at 353; *see*

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[29] Like the minority enhancement policy, the tax certificate policy creates at most a minimal burden on non-minorities. No non-minority entity is foreclosed from bidding on and buying a broadcast station under the policy. In many cases, the burden on non-minorities is non-existent. The tax certificate is not an inducement to many sellers. As noted above, both CIRI and Granite have made losing bids on various broadcast properties which were later sold to non-minorities, either because the non-minorities' bids adequately compensated for the tax certificate price, or because the seller did not value the tax certificate.

Further, while the tax certificate policy creates an incentive for certain licensees to seek out minority purchasers, there is no requirement that they do so. Once the seller has selected a buyer, the Commission is precluded from

Bakke, 438 U.S. at 318 (non-minority losing seat in class to minority "would mean only that his combined qualifications, which may have included similar nonobjective factors [to ethnic background], did not outweigh those of the other applicant").

The Commission's minority enhancement and other minority ownership policies are clearly narrowly tailored to achieve the Commission's and Congress' interests in diversifying control of the media of mass communications and thereby diversifying programming viewpoints to meet the needs, interests, and problems of the individual community.

CONCLUSION

The Court should affirm the decision of the court below that the FCC's comparative enhancement for minority ownership and integration in broadcast licensing proceedings is constitutional. The Commission's minority ownership policies, including the minority enhancement and tax certificate, serve

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considering whether the public interest would be better served by a sale to another party. *See* 47 U.S.C. § 310(d) (in acting on transfer or assignment application, "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee").

the Commission's and Congress' compelling interest in diversity of ownership of broadcast stations and diversity of programming and viewpoints, and are narrowly tailored to achieve those goals.

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